Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

NO. 85, ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

STATE OF TEXAS,

Plaintiff

V.

STATE OF OKLAHOMA,

Defendant

* * *

RESPONSE OF THE STATE OF TEXAS TO MOTION FOR LEAVE TO INTERVENE OF TEXAS POWER & LIGHT COMPANY

* * *

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INTERESTED PARTIES

1. The State of Texas, by and through its Attorney General, the Honorable Mark White and Leon J. Barish, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711.

2. The State of Oklahoma, by and through its Attorney General, the Honorable Jan Eric Cartwright, and John Percival, Assistant Attorney General, Office of Attorney General, State Capitol, Oklahoma City, Oklahoma 73105.

3. Texas Power and Light Company, and its attorneys of record Jeb Loveless, Burford & Ryburn, 1511 Fidelity Union Life Building, Dallas, Texas 75201; and Harry A. Poth, Jr., Peyton G. Bowman, III, Reid & Priest, 1111 19th Street, N.W., Washington, D.C. 20036.

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* * *

The State of Texas, by its Attorney General, makes its Response to the Motion for Leave to Intervene filed with the Court in this Action by Texas Power & Light Company, and states:

I.

The State of Texas neither supports nor opposes the Motion of Texas Power & Light Company (TPL) to intervene in this action. We do not believe TPL's intervention will unduly delay the resolution of this matter nor will it prejudice the rights of either party. We do not believe, however, that TPL has met the standard in the law governing intervention in original actions necessary to grant its application.

II.

The Rules of the Supreme Court do not specifically provide for intervention in original actions by third parties. Supreme Court Rule 9 does provide, however, that "motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those Rules, where their application is appropriate, may be taken as a guide to procedure in original actions. . . ." Thus, the Federal Rules of Civil Procedure must be consulted as a guide for the proper disposition of TPL's Motion for Leave to Intervene.

Federal Rules of Civil Procedure 24 provides for intervention of right and permissive intervention. Anyone is permitted to intervene in an action when such right is conferred by statute or the applicant claims an interest relating to the matter which is being litigated and the applicant's interest is not adequately represented by existing parties. Fed.R.Civ.P. 24(a). Anyone may be permitted to intervene when an applicant's claim or defense and the main action have a question of law or fact in common. Fed.R.Civ.P. 24(b). In considering a motion for permissive intervention, a court must consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The Supreme Court may exercise its discretion in accepting jurisdiction of original actions where an actual case or controversy is in doubt. *See New Mexico v. Texas*, 444 U.S. 895 (1979); *California v. Texas*, 437 U.S. 601 (1978). It follows that the Court may exercise even greater latitude in disposing of a motion to intervene in an original action. Although no case has ruled directly on the issue, it seems that the application of Fed.R.Civ.P. 24(a) regarding intervention of right would not be appropriate in considering a motion to intervene in an original action. Such application would

deprive the Court of its discretion in granting leave to intervene. Consequently, only intervention at the discretion of the Court should be appropriate in original actions.

III.

The few cases dealing with intervention in original actions seem to confirm this interpretation of the appropriate application of Fed.R.Civ.P. 24. The Court has permitted intervention where the applicant has a property interest at stake relating to the subject matter of the action. The Court has denied intervention, however, where no property interest is at issue or the applicant's interests are adequately represented by other parties.

In *Oklahoma v. Texas*, 252 U.S. 372 (1920), this Court authorized private parties to intervene in a boundary dispute to assert claims to land in the disputed area and proceeds from the sale of oil and gas produced therefrom. Neither State nor the United States, an additional intervenor, could represent the interests of these private parties because the sovereigns themselves also claimed the disputed property. Thus, the Court recognized the necessity of permitting intervention in that situation.

In *Utah v. United States*, 394 U.S. 89 (1969), this Court denied leave to intervene to a private party in a dispute over ownership of the Great Salt Lake and surrounding relicted lands. The parties to the action limited the issue in the case by stipulation so that the presence in the case of private property owners asserting claims to the disputed property was "neither necessary nor appropriate." *Id.* at 763. The private parties were claiming lands also claimed by both sovereigns. The stipulation provided for means of settling the claims of the sovereigns regardless of the claims of the private parties. This Court held that the private parties could

assert their claims in another forum and that Utah could waive (which it did) the protection of Fed.R.Civ.P. 19(a) concerning joinder of parties and the incurring of multiple obligations. Thus, even where a private party has a legitimate interest related to the subject matter of the original action, the Court in its discretion may deny leave to intervene. It should also be noted that the Court was concerned with the lack of complete diversity of citizenship if the applicant in *Utah v. United States* were permitted to intervene.

In its clearest explication of the standard to be met for intervention in an original action, this Court in *New Jersey v. New York*, 345 U.S. 369 (1953), denied leave to intervene to the City of Philadelphia. This case concerned the distribution of Delaware River water. The State of Pennsylvania successfully intervened in the action, demonstrating a necessity for specific relief. The City of Philadelphia then sought to intervene, asserting its interest in the Delaware River. This Court denied the application on the grounds that Philadelphia and its residents were already represented in the case by the State of Pennsylvania. Relying on the *parens patriae* doctrine, this Court stressed that a State represents all its citizens in a suit involving a matter of sovereign interest. The doctrine is necessary "as a working rule for good judicial administration." *Id.* at 373. Otherwise, there would be no limit on the number of citizens entitled to intervene. If Philadelphia were permitted to intervene, other municipal and industrial corporations would want to come in and assert their legitimate interests in the water.

The Court expressed in *New Jersey v. New York, Id.*, the appropriate standard for intervention for applicants such as TPL.

> An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart

> from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.

TPL seeks the same adjudication of the Texas-Oklahoma boundary at Lake Texoma that is sought by the State of Texas. The only factor which distinguishes TPL's interest from that of Texas is the reason behind it. TPL purchases electric power from the Corps of Engineers hydroelectric project at Denison Dam on Lake Texoma. TPL has a legitimate interest in making sure the powerhouse in which the electric power is generated is in Texas to avoid regulation by the Federal Energy Regulatory Commission. TPL's regulatory status, however, is only remotely related to the real issue in this action. It is not a property interest nor is TPL's contractual right to the purchased electric power. Thus, the only interest of TPL cognizable by this Court in this action is the proper adjudication of the Texas-Oklahoma boundary as sought by Texas. This interest is not imbued with any special character which cannot be represented and protected by the State of Texas. If TPL were permitted to intervene in this action on the grounds asserted in its Motion, its customers and other electric utilities to which it is interconnected would have to be permitted to intervene. This situation is what the *New Jersey v. New York* Court sought to avoid.

WHEREFORE, the Plaintiff, State of Texas, neither supports nor opposes TPL's Motion for Leave to Intervene, but recognizes it should probably be denied on the basis of the law governing such applications to this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Justin Andrew Kever, Assistant Attorney General of Texas, hereby certify that a true and correct copy of the above and foregoing has been served by placing same in the United States mail, postage prepaid, on this the _____ day of _____, 1980, addressed to counsel of record.

_____
JUSTIN ANDREW KEVER